Generally, this Court will not grant certiorari review of issues that were not "pressed or passed upon" by the lower courts.[8] The Court, in *Illinois v. Gates*, 462 U.S. 213, 221-2 (1983), identified the several purposes underlying the "not pressed or passed upon" rule as: 1) the record is likely to be inadequate concerning questions not raised below because it was not compiled with those questions in mind, 2) due regard for the appropriate relationship of the Supreme Court to state courts demands that the state courts be given an opportunity to consider the constitutionality of the actions of state officials and proposed changes in existing remedies for unconstitutional actions, and 3) it gives the state courts an opportunity to rest their decision on independent and adequate state grounds. In this circumstance the policy considerations do not support denying review of Mr. Freeman's *Ring* based claims. Each policy consideration will be addressed in turn.

THE RECORD ON APPEAL:

The record in this case sufficiently addresses the claims involving *Ring* to permit review by this Court. The Court in *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) explained the preference for an adequate record, stating: "Prudence...dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."

In this case Mr. Freeman presented the claims involving *Ring* to the Florida Supreme

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[8] *Illinois v. Gates*, 462 U.S. 213 (1983).

Court for the first time in a Motion for Rehearing.[9] The state of Florida filed a Response to the Motion for Rehearing in which it thoroughly addressed the *Ring* claims raised by Mr. Freeman. [10] Mr. Freeman also filed a motion in the Florida Supreme Court requesting that he be allowed to file a reply to the State's Response, or in the alternative to permit oral arguments on the Motion for Rehearing.[11] The Motion for Rehearing was summarily denied by the Florida Supreme Court.[12]

The record on appeal in this case is only incomplete with regard to opinions by the state trial court and high court addressing the merits of Mr. Freeman's federal claims. However, given the express refusal of the Florida judiciary to apply the *Ring* opinion to any case, the lack of an opinion by the Florida courts should not bar federal review in this case.

OPPORTUNITY FOR STATE TO ADDRESS FEDERAL QUESTION AND PROVIDE APPROPRIATE RELIEF:

The objective of this Court's policy to promote federalism by avoiding review of a federal question until a state has had an opportunity to address the claim and provide appropriate relief is not forwarded by denying review in this

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[9] See, *Appendix 1* (wherein Mr. Freeman requested reconsideration of Florida Supreme Court's denial of Mr. Freeman's Motion for Post-Conviction relief in light of this Court's then recently released opinion in *Ring*).

[10] See, *Appendix 2*.

[11] See Appendix 3, *Motion to File Reply or in the Alternative Request an Oral Argument to State of Florida's Response to Defendant's Motion for Rehearing.*

[12] *Freeman v. State*, 2003 Fla. Lexis 2078 (2003).

circumstance. The State argues in its Response that since Florida Rule of Appellate Procedure 9.330 (a)[13] does not permit new issues to be raised for the first time in a motion for rehearing, this Court must presume that the state decision rested on independent and adequate state grounds and therefore cannot address the *Ring* claims.[14]

In this case Mr. Freeman was unable to raise the *Ring* claims at his trial or on direct appeal because *Ring* had not yet been decided. Mr. Freeman presented his federal claims involving *Ring* to the Florida courts at the first available opportunity.

Mr. Freeman filed his brief on appeal from the state trial court's denial of his Motion for Post-conviction Relief in the Florida Supreme Court on April 11, 2002. Subsequently, *Ring v. Arizona*, 536 U.S. 584 (2002) was decided on June 24, 2002. The Motion for a Rehearing was the first opportunity for Mr. Freeman to bring the claims before a state court. Mr. Freeman should not be punished for failing to raise these issues in his trial when it was not cognizable to do so at that time. The United States Supreme Court addressed a similar situation in *O'Connor v. Ohio*, 385 U.S. 92 (1966).

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[13] "[a] motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant the court had overlooked or misapprehended in its decision, and shall not present the issues not previously raised in the proceeding." *Fla. R. App. Proc. 9.330 (a).*

[14] See, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (stating that when "the highest state court has failed to pass upon the federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.")

In *O'Connor*, a defendant (O'Connor) was tried in a state court for larceny. During the trial the prosecutor commented on the fact that O'Connor declined to testify on his own behalf. O'Connor did not object to the comments at the trial or raise the issue in his first appeal. O'Connor was convicted.

After his trial but before his conviction became final the United States Supreme Court decided *Griffin v. California*, 380 U.S. 609 (1965) wherein the court held that it is a violation of the Fifth Amendment for a prosecutor to improperly comment on a defendant's refusal to testify. The United States Supreme Court heard O'Connor's case on certiorari and remanded the case to the state court for review in light of *Griffin*.

On remand the state court denied O'Connor relief under *Griffin*, claiming that he was procedurally barred from bringing the claim because he had failed to object to the comments at trial or on his first appeal. The Supreme Court again granted certiorari, this time on the question of whether the state court could procedurally bar review of O'Connor's claim because he did not raise the issues at trial or on appeal where the grounds for the claim were not cognizable at the time of his trial or appeal. The Court held that under the circumstances of O'Connor's case the failure to object in the state courts could not bar the petitioner from asserting the federal right.[15]

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[15] In this case the *Ring* decision was released after Mr. Freeman had exhausted his direct appeal. Even though Mr. Freeman's case is considered final for *Teague v. Lane*, 489 U.S. 288 (1989) purposes, that label is not dispositive to this Court's decision to grant certiorari because the issues raised by Mr. Freeman involve fundamental error in the trial process and are not subject to *Teague*. The issue of retroactive application of *Ring* to Mr. Freeman's case has been briefed by both parties before this Court. The issue of whether Ring applies retroactively

Further, it should not be presumed that the Florida Supreme Court failed to pass upon the *Ring* based claims in Mr. Freeman's case for lack of proper presentation because the Florida Supreme Court has repeatedly stated that it will not apply this Court's opinion in *Ring* to any Florida case absent specific direction to do so by this Court.[16] The Florida judiciary should not be allowed to insulate state laws from federal review by refusing to address federal claims.[17]

In addressing the objective of this Court's deferment to state procedural grounds in the interest of federalism Justices Blackmun, Marshall, and Stevens wrote:

> It is well settled that the existence of a state procedural default does not divest a federal court of jurisdiction on collateral review. Rather, the important office of the federal courts in vindicating federal rights gives way to the States' enforcement of their procedural rules to protect States'

(presumably in regard to Arizona law) is pending before this Court in *Schriro v. Summerlin*, 124 S. Ct. 833 (Dec. 1, 2003).

[16] See, *Bottoson v. Moore*, 824 So. 2d 127 (Fla. 2002); See, *Lawrence v. State*, 846 So. 2d 115 (Fla. 2003) (noting that relief would not be warranted under *Ring* , even if applicable, because defendant had a prior violent felony conviction); and See, *Rivera v. State*, 859 So. 2d 495, 508 (Fla. 2003) (noting that no relief would be afforded under *Ring*, even if applicable, because jury verdict was unanimous).

[17] Even though these constitutional claims might be reviewed by a federal court in a habeas action, to continue to hold Mr. Freeman under a sentence of death absent a constitutional jury trial violates Mr. Freeman's right to Due Process under the Fifth and Fourteenth Amendments and the right to a jury trial under the Sixth and Fourteenth Amendments.

interest in being an equal partner in safeguarding federal rights.[18]

Under theses circumstances it is apparent that where the Florida state courts are reticent regarding important Constitutional rights violations inherent in the state's death penalty statute it is the role of this Court to protect those rights.

Mr. Freeman contends that the state courts were given fair and adequate opportunity to address the *Ring* issues but failed to do so, as they have in every other circumstance where a person has raised the claim. The Florida Supreme Court could have addressed this issue when it was presented in Mr. Freeman's Motion for a Rehearing and when Mr. Freeman requested oral arguments on the issues.[19] The Florida Supreme Court claims that it is unsure whether *Ring* applies to Florida's death penalty statute[20] yet it has never petitioned that a federal court address the issue.

INDEPENENT AND ADEQUATE STATE GROUNDS:

The rationale that a state should ordinarily be granted an opportunity to rest its decision on independent and adequate state grounds in the interest of federalism is not persuasive in this case. The lack of a jury trial on every element of the crime of which Mr. Freeman was charged

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[18] *Coleman v. Thomas*, 501 U.S. 722 (1991) (JJ. Blackmun, Marshall, and Stevens, dissenting).

[19] See, *D'oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988) (Error may be addressed for the first time on appeal where error is fundamental and amounts to a denial of due process)

[20] See, *Bottoson*, supra.

constituted fundamental error because it affected the very framework of the trial. There are no possible independent and adequate state grounds that would excuse this violation of Mr. Freeman's constitutional rights.

Where appropriate this Court has the power to notice plain or fundamental error appearing on the record, although no question in that respect was raised or properly raised by the parties.[21] This is such a case.

CONCLUSION

Mr. Freeman contends that the record before this court is sufficient to decide the issues presented in the petition for certiorari and that there is no other legitimate basis for denying review. Mr. Freeman prays that this court will grant certiorari review on these issues.

Mr. Freeman prays that in the alternative, should this court determine that the state should have an opportunity to review these claims, that this honorable Court remand this case to the Florida Supreme Court with direction to review the case in light of *Ring v. Arizona*.

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[21] See, *Vachon v. New Hampshire*, 414 U.S. 478 (1974); Also see, United States Supreme Court Rule 24 (a) stating, "At its option...the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

APPENDIX 1

SUPREME COURT OF FLORIDA

CASE NO.: SC01-2007
Lower Tribunal No.: 86-11599-CFA

JOHN D. FREEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

DEFENDANT'S MOTION FOR REHEARING

HERE COMES NOW, Defendant, JOHN D. FREEMAN (hereinafter Defendant), by and through his undersigned counsel, files this Motion for Rehearing on this Court's affirmance of the trial court's denial of Defendant's 3.850 Motion after an evidentiary hearing, and in support thereof states as follows:

1. Defendant was previously convicted of first-degree murder. (R. 145, 1564).

2. Defendant was subsequently sentenced to death after a jury vote of 9-3. (R. 257-259).

3. Defendant appealed his convictions and sentences, which were later affirmed on

direct appeal. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990).

4. Defendant filed a 3.850 Motion for Post-conviction Relief in 1995, in the Fourth Judicial Circuit, and said Motion was denied.

5. Defendant appealed said denial to Florida Supreme Court, and this Court remanded the issue of ineffectiveness of counsel at the penalty phase and the issue of racial bias claim for an evidentiary hearing, and affirmed the rest of said denial. *Freeman v. State*, 761 So. 1055 (Fla. 2000).

6. The trial court denied the remanded issues of the 3.850 Motion after an evidentiary hearing on July 16th and 17th, 2001.

7. Defendant appealed the trial court's denial to the Florida Supreme Court, alleging the following issues: (1) Ineffective assistance of counsel at the guilt phase of trial for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty (2) Ineffective assistance at the penalty phase for failing to present evidence in mitigation.

8. On July 11, 2003, the Supreme Court of Florida affirmed the trial court's denial of Defendant's Motion for Post-conviction Relief under Fla. R. Crim. Pro. 3.850. *Freeman v. State*, 852 So. 2d 216 (Fla. 2003).

9. The undersigned counsel was appointed to represent Defendant in the remainder of Post-conviction proceedings on July 9th, 2003.

10. Defendant contends that the Florida Supreme Court should grant a rehearing and other requested relief for the following reasons.

ARGUMENT ONE:
INEFFECTIVE ASSISTANCE OF COUNSEL

1. Defendant reestablishes the Ineffective assistance of counsel argument, and alleges that both Defendant's trial and appellate counsel were ineffective by failing to reasonably investigate statutory and nonstatutory mitigation, including failure to provide an expert to correlate Defendant's history of drug and alcohol abuse with any statutory mental mitigation.

2. Florida case law holds that long term use of drugs and alcohol is a nonstatutory mitigating factor. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *Robinson v. State*, 761 So. 2d 269 (Fla. 1999); *Foster v. State*, 654 So. 2d 114 (Fla. 1995).

3. Florida case law further holds that long term alcohol and drug abuse is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985).

4. In Defendant's guilt and penalty phase, Defendant's counsel did not adequately investigate, nor did the trial court consider his long term drug and alcohol abuse as either a statutory mitigating factor or a nonstatutory mitigating factor. *Freeman v. State*, 852 So. 2d 216 (Fla. 2003).

5. Further, no evidence of Defendant's previous drug and alcohol abuse was presented by Defendant's counsel in the guilt and penalty phase by either direct evidence or testimony of an expert.

6. Defendant's previous counsel admits, "he knew of Defendant's use of drugs and alcohol, but did not use that information because he could not link it to the crime, and that he should have "delved" more deeply into Defendant's drug and alcohol abuse." *Id.* The trial counsel further states, "I did not put on mitigation regarding Defendant's abuse of drugs and alcohol because, it would not do me any good in the penalty phase." (EMT p. 371).

7. Further in support of the ineffective assistance of counsel claim, during the evidentiary hearing on remand from the Florida Supreme Court, Defendant's appellate counsel demonstrated to the trial court through witness and expert testimony that Defendant's trial counsel was ineffective in finding the following mitigating circumstances of Defendant's life: (1) He had been abusing drugs and alcohol, including heavy doses of cocaine and marijuana since 1981, and up until he was arrested for his first murder conviction Defendant was "as strung out as they come." (EMT p. 510-511); (2) Severe physical abuse by his stepfather, Charles Freeman, that was just short of killing Defendant. (EMT p. 186, 265); (3) Was shown no love by his stepfather, and Defendant's mother did nothing to protect him from the abuse of his stepfather. (EMT p. 188); (4) Defendant suffered from organic mental disorder which is associated with impulsivity, making his capacity to conform his conduct to the requirements of the law substantially impaired. (EMT p. 125, 135); (5) Defendant's academic skills range from a third to seventh grade level. (EMT p. 125); (6) Defendant was prescribed medication while awaiting murder trial in Duval County, and was depressed and

suicidal during this time. (EMT p. 133); (7) Defendant has had low academic achievement. (EMT p. 331); (8) Defendant had trouble processing information, and tended to avoid conflict. (EMT p. 332); (9) School records indicated early and continuing academic problems, as well as social problems. (EMT p. 343); (10) Defendant does not see as many possible solutions to problems as others do. (EMT p. 132); (11) As a result of mental organic brain damage, Defendant is quite impulsive, making decisions on the spur of the moment without thinking about the consequences, and acts on the emotion of the moment. (EMT p. 132).

8. These aforementioned facts and circumstances of Defendant's history, as well as his mental and physical characteristics, have all been held by Florida Courts to be either statutory or nonstatutory mitigation. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *Doorbal v. State* 837 So. 2d 940 (Fla. 2003); *Hess v. State*, 794 So. 2d 1249 (Fla. 2001); *Foster v. State*, 654 So. 2d 114 (Fla. 1995); *Robinson v. State*, 761 So. 2d 269 (Fla. 1999).

9. Moreover, from the uncontroverted evidence of all previous proceedings, if presented by Defendant's trial or appellate counsel, the following mitigation could also have been used by the trial court in its determination as to whether death is the appropriate penalty: (1) Lack of a male role model when growing up; (2) Suffered from some mental or emotional disturbance when the murder was committed; (3) Poverty; (4) Troubled personal life; (5) Physical injuries; (6) Learning disabilities; (7) Had people who loved him; (8) Ability to adjust to prison life. *Hess v. State*, 794 So. 2d 1249 (Fla. 2001); *Foster v.*

State, 654 So. 2d 114 (Fla. 1995); Robinson v. State, 761 So. 2d 269 (Fla. 1999).

10. Moreover, Defendant's trial counsel, as well as previous appellate counsel, failed to have an expert perform an examination and introduce evidence that he suffered from either/or of the said statutory mental mitigators as the result of Defendant's chronic drug and alcohol abuse, despite the fact that Defendant had consistently been using drugs since approximately age eleven.

11. The trial court, in its Second Order Denying Defendant's First Motion for Post-conviction Relief, acknowledged Defendant's appellate counsel mistakes by stating that, "this Court will also note that the Defendant did not present at the evidentiary hearing from an expert qualified to testify regarding the effects of Defendant's alcohol and drug abuse. This Court finds that Defendant failed to prove that counsel's performance was deficient for this reason as well." (Court's Order affirming denial of 3.850, p. 7).

12. The uncontroverted proof from witness testimony shows that Defendant was a serious substance abuser, and without an accurate assessment by an expert regarding the Defendant's prior substance abuse in relation to possible statutory mitigation, Defendant will have been severely prejudiced. See Gaskin v. State, 822 So. 2d 1243 (Fla. 2002), [*holding the mitigators of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control behavior are of the weightiest order, and the failure to present them in the penalty phase may constitute prejudicial ineffectiveness*].

13. Both Defendant's trial counsel and previous appellate counsel were ineffective in

failing to present an expert witness who was qualified to give an opinion as to the correlation between the Defendant's mental mitigation and his substance abuse. In support thereof, this Court has stated that, "with Freeman's substantial history of drug and alcohol abuse, defense counsel may have been ineffective for failing to present an expert witness who was qualified to give an opinion on this issue... There is a reasonable doubt as to the effect such a witness might have had on the jury's recommendation." *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000).

14. It follows that most of the Defendant's history and characteristics were never brought out by previous counsel as both statutory and nonstatutory mitigation. In fact, the only mitigation presented by Defendant's trial counsel was low I.Q., he was artistic, liked playing with kids, and had been abused by his stepfather.

15. Had Defendant's previous counsel in both the trial and appellate levels done further research and investigation on what constitutes statutory and nonstatutory mitigation, an expert would have been assigned to evaluate the correlation between Defendant's substance abuse and the two statutory mitigators of extreme emotional or mental disturbance and capacity to conform one's conduct to the requirements of the law.

16. In summary, the following voluminous, virtually uncontroverted nonstatutory mitigation could have been presented at Defendant's penalty phase to further strengthen mitigation: (1) Lack of a male role model when growing up; (2) Suffered from some

mental or emotional disturbance when the murder was committed; (3) Poverty; (4) Troubled personal life; (5) Physical injuries; (6) Learning disabilities; (6) Had people who loved him; (7) Ability to adjust to prison life; (8) Defendant had been abusing drugs and alcohol, including heavy doses of cocaine and marijuana since 1981, and up until he was arrested for his first murder conviction Defendant was "as strung out as they come." (EMT p. 510-511); (9) Severe physical abuse by his stepfather, Charles Freeman, that was just short of killing Defendant. (EMT p. 186, 265); (10) Defendant was shown no love by his stepfather, and Defendant's mother did nothing to protect him from the abuse of his stepfather. (EMT p. 188); (11) Suffered from organic mental disorder which is associated with impulsivity, which made his capacity to conform his conduct to the requirements of the law substantially impaired. (EMT p. 125, 135); (12) Defendant's academic skills, which range from a third to seventh grade level. (EMT p. 125); (13) Defendant was prescribed medication while awaiting murder trial in Duval County, and was depressed and suicidal during this time. (EMT p. 133); (14) Defendant has had low academic achievement. (EMT p. 331); (15) Defendant had trouble processing information, and tended to avoid conflict. (EMT p. 332); (16) School records indicated early and continuing academic problems, as well as social problems. (EMT p. 343); (17) Defendant does not see as many possible solutions to problems as others do. (EMT p. 132) and (18) As a result of mental organic brain damage, Defendant is quite impulsive, making decisions on the spur of the moment

without thinking about the consequences, and acts on the emotion of the moment. (EMT p. 132).

17. With the possibility of the two statutory mental mitigators, together with the aforementioned voluminous nonstatutory mitigators, if presented at the penalty phase at Defendant's trial, would have had a reasonable probability of yielding a verdict of life imprisonment. Rose v. State, 675 So. 2d 572 (Fla. 1996).

ARGUMENT TWO:
DEFENDANT'S SENTENCE IS DISPROPORTIONATE

1. Coupled with the aforementioned unfound mitigation, Defendant's sentence is disproportionate, because Defendant's sentence is not the most aggravated and the least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 7 (Fla. 1973) *See also;* Livingston v. State, 565 So. 2d 1288 (Fla. 1988), [*wherein the trial court found three aggravating factors - prior violent felony, murder committed during a robbery, and murder committed to avoid arrest. The Court balanced those factors against two mitigating circumstances - the Defendant's age (seventeen) and the Defendant's unfortunate upbringing and rearing - and found death was warranted. On appeal, this Court vacated the death sentence, struck the avoid arrest aggravator, and found on the record the following mitigators that effectively outweighed the remaining two aggravators: (1) Abused as a child (2) Mother neglected him (3) Defendant's age, inexperience, and immaturity (4) Marginal intellectual functioning and (5) Substance abuse of cocaine and marijuana.*] *Also see:* Kramer v. State, 619 So. 2d 274 (Fla. 1993) [*wherein the trial court*

found two aggravating factors - prior violent felony and the murder was especially heinous, atrocious, or cruel (HAC), and on appeal from a sentence of death, this Court vacated the sentence due to the following mitigating evidence: (1) The Defendant was under the influence of mental or emotional stress at the time the crime was committed (2) The Defendant's capacity to conform his conduct to the requirements of the law was severely impaired at the time of the crime (3) Defendant was a model prisoner (4) Defendant suffered from alcoholism and prior drug use.]

2. Further in support of the argument that Defendant's sentence is disproportionate is the case of *Johnson v. State*. In Johnson, the trial judge found three statutory aggravators: (1) Defendant had prior violent felonies; (2) The murder was committed while Defendant was engaged in the commission of a burglary; (3) The murder was committed for pecuniary gain. The judge found the statutory mitigators of age (Defendant was twenty-two at time of the crime), and the following nonstatutory mitigation: (1) Defendant surrendered to the police; (2) Defendant had a troubled childhood; (3) Defendant was previously employed; (4) Defendant was a good son and neighbor; (5) Defendant has a young child; (6) Defendant earned a high school graduate equivalency degree and participated in high school athletics. After the trial judge imposed the death sentence, this Court vacated Defendant's death sentence, finding that Defendant's sentence was disproportionate in light of the prior violent felony aggravator and the burglary/pecuniary gain aggravator balanced against the aforementioned statutory and

nonstatutory mitigation. 720 So. 2d 232 (Fla. 1998).

3. The Defendant's facts and circumstances in the instant case closely resemble *Johnson*, where, as stated, this Court found the Defendant's death sentence disproportionate.

4. Defendant contends that with another evidentiary hearing, Defendant's undersigned counsel would have an expert testify to statutory mental mitigation correlated with long term substance abuse of drugs and alcohol, as well as show the trial court the overwhelming nonstatutory mitigation that Defendant's previous trial and appellate counsel failed to investigate and/or bring forth as mitigation.

5. Had the proposed factual and expert testimony evidence been presented at the penalty phase of Defendant's trial, there is a reasonable probability that, but for Defendant's trial counsel's ineffectiveness, the balance of aggravating and mitigating circumstances would have been different and yielded a sentence of life. Defendant's trial counsels' lack of reasonable investigation and research prejudiced and deprived Defendant of a reliable penalty phase proceeding. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *See Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), [*finding if said nonstatutory evidence was presented during the penalty phase, there is a reasonable probability that the Defendant would have been sentenced to life.*] *Rose v. State*, 675 So. 2d 572 (Fla. 1996).

6. In light of the lack of meaningful investigation and research by Defendant's previous counsel regarding the abundance of potential mitigating evidence, both statutory and

nonstatutory, this Court should grant this Motion for Rehearing and remand Defendant's case to the trial court for an evidentiary hearing so the undersigned counsel can present said mitigation evidence.

ARGUMENT THREE:
TRIAL COURT DID NOT CONSIDER AND WEIGH ALL MITIGATING EVIDENCE CONTAINED IN THE RECORD

1. Defendant contends that the trial judge did not consider and weigh all the mitigating evidence contained in the record in accordance with *Farr v. State*, 621 So. 2d 1368 (Fla. 1993).

2. In *Farr*, the trial court ignored the mitigating evidence on record and chose to focus on the heinousness of the crime and Defendant's past criminal record to find the Defendant deserving of the death penalty. On appeal, this Court ruled that the trial court was required to consider "any evidence of mitigation on the record," including Defendant's psychiatric and presentence reports, and because the trial court failed to do so, the death sentence was vacated. *Id*. *See also:* *Robinson v. State*, 684 So. 2d 175 (Fla. 1996). [*This Court vacated the death sentence and remanded to the trial court because the lower court failed to consider and weigh all of the available mitigating evidence in the record such as appellant's mental functioning and history of alcohol and/or drug abuse.]*; *Santos v. State*, 591 So. 2d 160 (Fla. 1991).*["It is well settled that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted."]*

3. In the instant case, in violation of *Farr* and the other aforementioned cases, the trial

court failed to consider and weigh all of the available mitigating evidence contained in the record. For example, nowhere in the judge's sentencing order does it mention the fact that Defendant's counsel presented said two statutory mitigators, including the statutory mitigation of Defendant's age, even though the jury was instructed by the trial judge on the possibility of these two mitigators. ["*Among the mitigating circumstances you may consider if established by the evidence are: One, the victim was a participant in the Defendant's conduct or consented to the act, and two, the age of the Defendant at the time of the crime.*"]

4. The following cases show that the trial judge should have found the statutory age mitigator applied to the Defendant, for instance, this Court has stated the following: ["*The age* ***mitigator*** *allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with the no significant criminal history* ***mitigator,*** *the length of time that the defendant has obeyed the laws in determining whether or not one explosion of criminality warrants the extinction of life.*"][*Further, for a court to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems. Age is a mitigating circumstance where a defendant's long history of substance abuse, mental and emotional instability, and passivity in the face of mental and physical abuse provides the essential link between the defendant's age and immaturity.*"]["*Moreover, where there is no per-se rule which pinpoints age as statutory mitigation,*

Defendant's ages of twenty-one and twenty-three have been ruled to be statutory mitigation."] Blackwood v. State, 777 So. 2d 399 (Fla. 2000).; Hurst v. State, 819 So. 2d 689 (Fla. 2002); Huddleston v. State, 475 So. 2d 204 (Fla.); Cannady v. State, 427 So.2d 723 (Fla. 1983).

5. The uncontroverted evidence given explained by both Dr. Legum and Dr. Larson show that Defendant suffered from (1) Physical and emotional abuse by the hands of his stepfather; (2) Poor social skills (tended to avoid conflict); (3) Had academic skills in the range of a third to seventh grader; (4) Substance abuse from both hard drugs and alcohol; (5) Depression while awaiting pretrial; (6) Suicidal tendencies while awaiting murder trial; (7) Poor school performance; (8) Organic brain damage and; (9) Low I.Q.

6. Defendant's aforementioned facts show that he suffered from substance abuse, mental and emotional instability, and mental and physical abuse, all of which are precisely the factors that the Court in *Hurst* used to explain how a non-minor Defendant can have the statutory mitigator of age. 819 So. 2d 689 (Fla. 2002)

7. These facts and circumstances of Defendant conclusively prove that age should have been considered and evaluated in the trial court's sentencing order and/or included in the trial court's weighing process as a statutory mitigator under the principle ruling of *Hurst v. State*.

8. Further, nowhere in the judge's sentencing order does it contain the following valuable evidence that has been found by Florida case law to constitute nonstatutory mitigation,

which was apparent from the record and further argued in Defendant's counsel's closing argument of his penalty phase: (1) Lack of a male role model when growing up; (2) Poverty; (3) Troubled personal life; (4) Immaturity; (5) Had people who loved him; (6) Defendant's academic skills range from a third to seventh grade level; (7) Emotional and mental disturbance.

9. Because "it is well settled that all mitigating evidence must be considered and weighed when contained anywhere in the record," and this necessary procedure was not abided by the trial judge as evinced by the previous paragraph, this Court should vacate Defendant's sentence with an order to the trial court to conduct a new penalty phase hearing in which all mitigating evidence is to be weighed against the aggravating circumstances of the crime before the trial court determines the proper penalty. Santos v. State, 591 So. 2d 160 (Fla. 1991); Farr v. State, 621 So. 2d 1368 (Fla. 1993). [*"It is clearly the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed, and it is error to fail to do so."*]; Robinson v. State, 761 So. 2d 269 (Fla. 1999). [*Defendant argued to no avail that the trial court failed to consider or give proper weight to the mitigating evidence, but this Court disagreed, because the trial judge "meticulously identified each mitigating circumstance presented by the defense and stated her conclusion as to each mitigator, supplying facts and reasoning for her conclusions."*]

ARGUMENT FOUR: DEFENDANT'S SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA

1. Defendant contends that his sentence is unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002); and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

2. In Florida, the death penalty may only be imposed if the court sets forth in writing its findings upon which the sentence of death is based as to the following facts: (1) That sufficient aggravating circumstances exist; and (2) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *Fla. Stat. 921.141* (2003).

3. Further, in each case where the court imposes the death penalty, the court shall make specific written findings of fact based upon the aggravating and mitigating circumstances, and upon the records of the trial and sentencing proceedings. *Id.*

4. Lastly, if the court does not make the requisite finding to impose the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with *Fla. Stat. 775.082*.

5. Therefore, even though the trial judge gives the jury's recommendation great weight, it is the judge, not the jury, who makes the final determination whether to impose the death penalty, based on the judge's independent review and subsequent written findings that conclude the listed aggravating circumstances outweigh the

listed mitigating circumstances. (*Fla. Stat. 941.141.*)

6. It follows that the death penalty shall not be *imposed* in Florida unless the trial judge conducts an independent review of *all* the aggravating and mitigating circumstances and concludes that the aggravating circumstances *outweigh* the mitigating circumstances. Fla. Stat. 921.141 (2003). Usually a finding of one aggravating circumstance will not suffice, for if any substantial mitigation exists, a finding of death will almost always be disproportionate. Nibert v. State, 574 So. 2d 1059 (1990). [*"While this Court on occasion has affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation."]*

7. In summary, the judge does not merely consider one aggravating circumstance before imposing the death penalty, but rather must consider all the aggravating factors and find that in totality, they outweigh the mitigators. This is an absolute requirement in Fla. Stat. 941.141.(2003).

8. However, the United States Supreme Court has ruled that a jury, not a sentencing judge, must find the aggravating circumstances necessary for the imposition of the death penalty. Ring v. Arizona, 536 U.S. 584 (2002).

9. Further, United States Supreme Court recently clarified the Ring decision stating, "we held (in Ring v. Arizona) that the Sixth Amendment requires that a jury, and not a judge, find the existence of *ANY* aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt." Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

10. Therefore, Florida's sentencing statute *Fla. Stat. 921.141* cannot pass constitutional muster under the Supreme Court decisions *Ring v. Arizona* and *Sattazahn v. Pennsylvania*, because in order for a Florida Defendant to be sentenced to death, a judge must first impose the death penalty only by making an individual determination that there is enough aggravating circumstances to outweigh the mitigating circumstances. Florida's death penalty statute reads: "*notwithstanding the recommendation of a majority of the jury... can impose a sentence of death if the judge sets forth in writing its findings that... sufficient aggravating circumstances exist... that outweigh the mitigating circumstances.*" Id., This is a finding that *Ring* and *Sattazahn* specifically holds to be a function solely of the jury.

11. For Florida's sentencing scheme to pass constitutional muster under *Ring v. Arizona*, the jury would first have to give the judge written findings as to any and all aggravating factors that have been found beyond a reasonable doubt. After said jury findings have been done, the judge may then constitutionally impose the death penalty using the listed aggravators given by the jury. This sentencing scheme would satisfy *Ring* and *Sattazahn* in their holdings that "a jury, and not a judge, must find the existence of *any* aggravating circumstance necessary for the imposition of the death penalty." *Id*.

12. *Fla. Stat. 941.141 (3)(a)* makes it clear that "imposition" of the death penalty is accomplished only when the sentencing judge, and not the jury, finds the existence of all aggravating circumstances necessary for the death penalty, a written finding of the

enumerated aggravating circumstances that *Ring* and *Sattazahn* holds to be made exclusively by a jury. *Id.*

ARGUMENT FIVE:
FLORIDA'S AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE OFFENSE ACCORDING TO SATTAZHAN V. PENNSYLVANIA

1. Florida's aggravating factors constitute an "element of an offense for purposes of the Sixth Amendment's jury-trial guarantee." *Id.* [*"Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a Defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt."*]

2. In Florida, for a Defendant to be sentenced to death, the Defendant first must be found guilty of 1st degree murder by a jury. Next, in the penalty phase, the same jury may render an advisory sentence of death, made by a determination that there are sufficient aggravating circumstances to outweigh mitigating circumstances. The jury does not have to make any written findings on which specific aggravating factors exist or which aggravating factors they had found. *Fla. Stat. 941.141 (2)(a)(b)(c)* (2002). Notwithstanding the jury's advisory sentence, the sentencing judge, in order to impose the death sentence, must place in writing findings that all the aggravating circumstances outweigh all the mitigating circumstances. *Id.* In short, there are two separate proceedings where the Defendant can be sentenced to two different sentences, to-wit: a binding jury sentence of life by finding the

Defendant guilty of 1st degree murder, and two; a judge's written sentence of death by finding that specific aggravating factors outweigh specific mitigating factors.

3. For example, Fla. Stat. 775.082 (1) (2003), shows the two possible sentences a defendant faces: [*"A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in S. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."*]

4. However, as explained in *Sattazhan*, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of murder plus one or more aggravating circumstances; whereas the former exposes a Defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." *Id.*

5. *Sattazhan* explains that Florida Defendants face a maximum punishment of life imprisonment, unless the sentencing judge finds the existence of one or more aggravating circumstances and states in written findings that the aggravators outweigh the mitigating circumstances, and thereby imposes a death sentence.

6. Therefore, Florida's sentencing scheme is directly affected by *Ring* because there must be a finding by the trial judge ("notwithstanding the jury's advisory sentence, the judge, after weighing the aggravation and mitigation, decides life or death") of at least one aggravating circumstance to increase Defendant's

jury sentence from life to death. Ring v. Arizona, 536 U.S. 584 (2002).

7. As a result, Florida's aggravating circumstances constitutes an element of the offense for purposes of the Sixth Amendment, because the existence of that fact (the aggravating circumstance) increases the maximum punishment of life that may be imposed on a Defendant to death, and that fact, no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584 (2002); *Sattazahn v. Pennsylvania*, 537 So. 2d 101 (2003).

8. This Court has stated that the aforementioned argument is misplaced because it holds that case precedent has stated that aggravators are not elements of the offense and that a Defendant faces a maximum possible penalty of death. *Hildwin v. Florida*, 490 U.S. 638 (1989)[*"The existence of an aggravating factor here is not an element of the offense but instead is a sentencing factor that comes into play only after the Defendant has been found guilty."*]; Mills v. Moore, 786 So. 2d 532 [*"There can be no doubt that a person convicted of a capital felony faces the maximum penalty of death."*]

9. However, the unambiguous holding in *Sattazahn*, directly contradicts *Mills v. State*, whereby the Supreme Court of the United States held that "murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances; whereas the former exposes a Defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." *Id.* Also, in Apprendi v. New Jersey, the dispositive question

is "one not of form but of effect." 530 U.S. 466 (2000). The holding in *Sattazahn & Apprendi* applies directly to the Florida death penalty sentencing scheme, because, notwithstanding the jury's advisory sentence, in order for a Defendant to be sentenced to death, the sentencing judge must find the existence of one or more aggravating circumstances, weigh those aggravators against any mitigation, and then hold that the aggravating circumstances outweigh the mitigation to impose the death sentence. Also, if the judge finds that the mitigation outweighs the aggravation, the sentencing judge must impose life. *Fla. Stat. 941.141* (2002). Therefore, the only way a Defendant can be sentenced to death in Florida is if, without any help from a jury, a judge looks at every aggravating circumstance, every mitigating circumstance, and determines that aggravation outweighs mitigation. Without a judge's determination of one or more of the aggravating circumstances, the maximum sentence in Florida is life. In conclusion, the judge's finding of those facts (the aggravating circumstances) and weighing them against any mitigation, is the only way a Defendant's sentence can be increased from the jury's guilty verdict of 1st degree murder to death. *Ring v. Arizona*, 536 U.S. 584 (2002). It follows that *Sattazahn* and *Mills* are in direct conflict with one another, and therefore *Mills* should be receded from and Florida's maximum sentence should be life.

10. For the aforementioned reasons, *Hildwin v. State* is also in conflict with *Ring* and *Sattazahn*. After the jury renders a Defendant guilty of 1st degree murder, the death penalty may not be imposed in Florida without a judicial determination that sufficient aggravators

outweigh mitigators; a process whereby *Sattazahn* makes clear that murder is a "distinct, lesser included offense, whereby the death sentence is a separate, greater offense." *Id.*

11. Further, the Supreme Court's decision in *Apprendi* also held that "a Defendant may not be exposed... to a penalty exceeding the maximum he would have received if punished according to the facts reflected in the jury verdict alone." *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

12. Since *Ring* made *Apprendi* applicable to capital cases, it further appears that the Florida death penalty statute is unconstitutional, and *Hilden* should be receded. For example, the facts in a jury's verdict of guilty of 1st degree murder do not mention all the necessary aggravating circumstances needed to outweigh the mitigation and impose the death sentence. This finding of necessary aggravating factors are later found by a sentencing judge, who makes written findings of all the aggravating circumstances and mitigating circumstances and weighs the two circumstances to see if death is appropriate. Therefore, since "murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances," it is the sentencing judge who thereby "exceeds" the jury's maximum verdict of life imprisonment, according to *Apprendi*, because the facts in the jury's verdict alone do not contain all the necessary aggravating circumstances used to weigh against the mitigating circumstances and impose the death sentence; This imposition of death can only be accomplished, according to Florida law, by the sentencing judge who must weigh, in writing, all of the aggravating and mitigating circumstances,

and make written findings as to why death is an appropriate sentence.

13. With the holding of *Apprendi* and *Sattazahn*, it is now apparent that the Florida death sentencing scheme comes under the umbrella and is directly affected by *Ring v. Arizona*, rendering the holdings in both *Hildwin* and *Mills* irreconcilable. In light of the aforementioned Supreme Court cases, Florida's aggravating circumstances should now be considered as elements of a capital offense, and it further should be held that the maximum punishment a Defendant faces in Florida is life imprisonment.

ARGUMENT SIX:
A JURY MUST FIND ALL AGGRAVATING CIRCUMSTANCES (OTHER THEN THE PRIOR VIOLENT FELONY CONVICTIONS BEYOND A REASONABLE DOUBT)

1. The existence of a prior violent felony aggravator does not render a judicial finding of all other aggravators harmless under *Ring v. Arizona.* As stated by Justice Anstead's dissent in *Duest v. State*, "the Sixth Amendment requirements announced in *Ring* and *Apprendi* do not allow a trial judge alone to find additional aggravating circumstances to be utilized in imposing the death penalty just because a prior violent felony aggravating circumstance need not be found by the jury." *Duest v. State*, 2003 Fla. LEXIS 1069 (Fla. 2003).

2. In support of the holding that aggravating circumstances other than a prior violent felony conviction can be found by a sentencing judge without a jury first finding said aggravators beyond a reasonable doubt, this

Court cites the *Almendarez-Torres* decision. In *Torres*, the United States Supreme Court held that a Defendant's prior conviction may be found by the judge even if it increases the statutory maximum sentence. 523 U.S. 597 (1998).

3. Further, the *Almendarez-Torres* decision, in its plain meaning, states that if the prior violent felony conviction is the sole aggravating circumstance, and it outweighs the mitigating circumstance(s), the sentencing judge is constitutionally allowed to impose a sentence of death.

4. It follows that the narrow holding of *Almendarez-Torres* allows a sentencing judge to increase the maximum penalty of a life sentence to a death sentence only if the sentence could possibility be increased by using the *sole prior violent felony aggravator*. In other words, if a Florida judge, by weighing this one aggravating circumstance, to-wit: the prior violent felony, against any mitigating circumstances, finds that this sole prior violent felony aggravating circumstance outweighs the mitigation, the death sentence will be found to be constitutionally imposed under *Ring* and *Apprendi*.

5. However, the *Almendarez-Torres* decision does not say what is to take effect if the sole prior violent felony aggravator is not enough for the sentencing judge to legally increase a life sentence to a death sentence by sufficiently finding that the aggravation outweighs the mitigation. That question is what the decisions of *Ring* and *Apprendi* answer, to-wit: "any other fact (other than the prior conviction aggravator found in the *Almendarez-Torres* decision) that increases the maximum punishment that may be imposed on a Defendant... constitutes an element, and

must be found by a jury beyond a reasonable doubt." 122 S. Ct. 2428 (2002).

6. The combined decisions of the Supreme Court cases of *Almendarez-Torres*, *Ring*, *Sattazahn*, and *Apprendi* state the following logical conclusion: If a prior violent felony aggravator is sufficient to outweigh the mitigating circumstances, a sentencing judge, by making written findings, can constitutionally increase the jury's verdict from a life sentence to the death penalty without the jury making a finding that this prior violent felony conviction exists beyond a reasonable doubt. If, however, the prior violent felony aggravator by itself would not outweigh the mitigating circumstances, the sentencing judge may not just use and weigh any other aggravating circumstances to impose the death penalty, but rather first must have the jury find the existence of any other aggravating circumstances beyond a reasonable doubt before the judge may use said aggravating circumstances to constitutionally increase the jury's life sentence and impose the death penalty.

7. Further, if a judge finds that there are other aggravating circumstances than the prior violent felony and uses these aggravating circumstances in the weighing process to impose the death sentence, without first having the jury find the existence of said aggravators beyond a reasonable doubt, the sentencing process is constitutionally flawed under *Ring*, *Sattazahn*, and *Apprendi*.

8. It follows that when a judge uses aggravating circumstances other than a recognized prior violent felony aggravator established in *Torres*, without first having the jury find said aggravators beyond a reasonable doubt,

the judge's findings of said aggravators are not harmless error.

9. To conclude that a judicial finding of aggravators other than the prior violent felony is harmless error would be to conclude that the prior violent felony aggravator, by itself, could be sufficient to outweigh any amount of mitigation, whether statutory or nonstatutory. Allowing a said judicial finding of other aggravators to effectively outweigh the mitigation would be to effectively evade said latter process endorsed by *Ring*, which would essentially let a sentencing judge impose the death sentence by using the prior violent felony aggravator as a smoke screen for other aggravating circumstances to slip by the constitutionally mandated requirement that the jury prove these aggravating circumstances beyond a reasonable doubt. This scenario has the possibility trumping even the greatest amount of mitigation, which is an unconstitutional violation under *Ring*, *Sattazahn*, *and Apprendi*, *Fla. Const. Art. 1 Section 22*, and *Furman v. Georgia.*

10. Again, said scenario is apparently not what the U.S. Supreme Court had in mind when it decided *Ring*, *Sattazahn*, or even *Torres*, when in *Ring* the Court stated that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a Defendant, that fact – no matter how the State labels it – constitutes an element of the offense, and must be found by a jury beyond a reasonable doubt. *Id*. In other words, if the sole prior violent aggravator is not enough to outweigh the mitigation present, any other aggravating circumstances become elements of the offense, and first must be proven beyond a reasonable

doubt before the sentencing judge can use them in the weighing process.

11. It follows that if other aggravating circumstances are necessary for a sentencing judge to successfully outweigh mitigation, said aggravating circumstances become elements of the offense, and therefore it is not harmless error to have a judicial finding on elements of the offense.

12. Moreover, in determining whether federal constitutional error may be considered harmless, the United States Supreme Court has held that, "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18 (1967). Under this test, the "beneficiary of the constitutional error," the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*

13. Applying the holding in *Chapman* to the facts of Defendant's case, the State cannot prove beyond a reasonable doubt that the sentencing judge, without using and incorporating Defendant's other aggravating circumstances in the weighing process against the mitigation, could have sentenced Defendant to death.

14. For instance, the trial judge, in his written findings, found the following aggravating circumstances: (1) Defendant had a prior violent felony conviction; (2) The capital felony was committed for pecuniary gain; (3) Capital felony was committed while Defendant was engaged in the commission of a burglary of a dwelling. The trial judge appropriately merged aggravating (2)

and (3) into one burglary/pecuniary gain aggravating circumstance. Further, the trial judge found four nonstatutory mitigators: (1) Artistic Ability; (2) Low intelligence; (3) Abused by his stepfather; (4) Enjoyed playing with children. After weighing both the established aggravating circumstances against the mitigation, the trial judge sentenced Defendant to death.

15. Applying the harmless error test in light of *Ring* and *Sattazahn*, it cannot be said the sentencing judge could have sentenced Defendant to death based solely on Defendant's prior violent felony aggravator. In *Nibert v. State*, this Court held that it has affirmed **death sentences** supported by **one aggravating circumstance** only in cases **involving** "either nothing or very **little** in **mitigation." 574 So. 2d 1059 (Fla. 1990). Further, this Court held that** substantial **mitigation** may make the **death** penalty inappropriate even when the **aggravating circumstance** of heinous, atrocious, or cruel has been proved. *Smalley v. State*, 546 So. 2d 720 (Fla. 1989).

16. The sentencing judge, without having the jury find the merged aggravating circumstance beyond a reasonable doubt as held by *Ring*, *Sattazahn*, *Apprendi*, and *Torres*, could only constitutionally weigh Defendant's prior violent felony aggravator against the four established findings of mitigation. Because Defendant had more than just, "little or no mitigation," it cannot be said beyond a reasonable doubt that the sentencing judge could still have found this sole aggravating circumstance to outweigh the four mitigators, and therefore the judge's finding of the merged aggravating circumstance, without the jury finding it first

beyond a reasonable doubt, is not harmless error under *Chapman*.

17. Lastly, in conjunction with *Ring*, *Sattazahn*, and *Apprendi*, *Furman v. Georgia* is also violated when a sentencing judge unconstitutionally imposes a sentence of death by using aggravating circumstances other than the prior violent felony, without first having the jury prove these other aggravating circumstances beyond a reasonable doubt.

18. For instance, there is a violation of the Eighth Amendment when the sentencer's discretion is not channeled and limited, because the sentencing discretion then becomes a wholly arbitrary and capricious action... *Maynard v. Cartwright*, 486 U.S. 356 (1998).

19. Further, to allow a sentencing judge to essentially find "elements of the offense" (aggravating circumstances according to *Ring*, 536 U.S. (2002) and impose a death sentence, without the jury first finding the said elements beyond a reasonable doubt, is to allow a sentencing judge to impose the death penalty in an arbitrary and capricious manner under the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972).

20. Essentially, the Florida death penalty statute allows the sentencing judge to take the place of a jury and find the existence of the elements of a Defendant's death sentence beyond a reasonable doubt.

21. In Florida, it has been held that a jury, and not a judge, must find the existence of all the elements of an offense beyond a reasonable doubt. *Legg v. State*, 742 So. 2d 846 (2nd DCA 1999). *See also: Ramierz. v. State*, 810 So. 2d 836

Fla. (2001) [*"The state must prove each element of the charged offense beyond a reasonable doubt."]*

22. Now, with said United States Supreme Court holdings, aggravating circumstances are elements of an offense, and a judge that imposes a death sentence without first a jury finding of any aggravators beyond a reasonable doubt(other than a prior violent felony) is not only unconstitutionally imposing the death penalty under *Ring* and *Sattazahn*, but further imposing a death penalty that is in violation of the Eighth Amendment and *Furman*, because the judge is arbitrarily and capriciously finding elements of an offense that is solely for the jury to find.

23. Lastly, the following summary of arguments is made for the purpose of this Court to consider as well as to preserve Defendant's federal appeals.

(1) *Sattazahn v. Pennsylvania's* holding which states, "a jury, and not a judge, must find the existence of any aggravating circumstances... beyond a reasonable doubt," applies to all states that use aggravating circumstances necessary to impose the death penalty, including Florida. 537 So. 2d 101 (2003).

(2) A sentencing judge that sits with a jury in Florida is no different than a sentencing judge that sits without a jury in Arizona, because an imposition of the death penalty can only be made if a judge makes written findings and concludes that aggravating circumstances outweigh mitigating circumstances. Without said finding by a judge, the maximum penalty in both states is life imprisonment. [*Stating that without said findings by the court a Defendant... shall be*

punished by life imprisonment.] Fla. Stat. 775.082(1) (2003)

(3) *Ring* has retroactive application to Defendant's Post-conviction appeals. *Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111.

(4) Florida's aggravating circumstances, with the exception of the prior violent felony aggravator, are elements of the offense and must be found by a jury beyond a reasonable doubt, and therefore, the said aggravating circumstances must be found unanimously. [*"In this state, the verdict of the jury must be unanimous," and a violation of said rule violates Defendant's Due Process rights to a fair trial.]* *Jones v. State*, 92 So. 2d 261 (Fla. 1956). [*Before jurors can return a guilty verdict, they must unanimously agree that each element of the charged offense has been established beyond a reasonable doubt.]* *Fla. R. Crim. Pro. 3.440.*

(5) Florida Standard Jury Instructions are flawed under *Ring* and *Caldwell* because they state to the jury that their recommendation and role of death is only advisory.

(6) The finding of all mitigating circumstances is a factual "finding of fact that increases the maximum punishment that may be imposed on a Defendant" under *Ring*, and therefore a jury is to make a finding of all the mitigating factors, as well as all the aggravating circumstances (excluding prior violent felony aggravator.) [*"If a state makes an increase in a Defendant's authorized punishment contingent on the finding of a fact, the fact -no matter how the State labels it - must be found by a jury beyond a reasonable doubt."*] *Johnson v. Nevada*, 59 p. 3d 450 (2002).

(7) The weighing process itself that determines whether there are sufficient aggravating circumstances that outweigh mitigating circumstances is also a "finding of fact that increases the maximum punishment that may be imposed on a Defendant" under *Ring*, and therefore shall be found by the jury.

(8) Jury sentencing is mandated by the Eighth Amendment.

(9) The jury has to make specific, written findings as to what aggravating circumstances and mitigating circumstances were found beyond a reasonable doubt in order to ensure that the death penalty is not being imposed arbitrary under *Furman v. Georgia*.

WHEREFORE, Defendant requests this Honorable Court to grant this Motion for rehearing based on said decisions by the United States Supreme Court and/or grant Defendant's Motion for rehearing and thereby order the trial court to conduct an evidentiary hearing on Defendant's ineffective assistance of counsel claims and the trial court's failure to consider mitigation claim.

APPENDIX 2

IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,

Appellant,

CASE NO. SC01-2007

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO MOTION FOR REHEARING

Counsel reargues that trial counsel was ineffective for failing to present Freeman's drug and alcohol abuse in the penalty phase as non-statutory mitigation. Motion for rehearing at 3. Trial counsel did not want to present evidence of drug and alcohol abuse because it is often viewed negatively by jurors. At the evidentiary hearing, trial counsel testified that he was unaware of the defendant's alcohol and drug use. (EH 362). He was aware of Freeman's use of marijuana, cocaine, and alcohol. (EH 98). Trial counsel testified that he did not want to present evidence

of alcohol and illegal drug use to the jury. (EH 336,364). Portraying the defendant as a doper or drunk would not advance the cause. (EH 337). Trial counsel explained that there is a good segment of society that is not crazy about drug use. (EH 337). In his view, alcohol and illegal drug use are not compelling mitigation. (EH 337,362). The trial court found that trial counsel's decision not to present evidence of alcohol and illegal drug use was a tactical decision, based on counsel's belief that jurors do not view such information favorably. (R. 1160).

Alcohol and illegal drug use are dangerous mitigation. *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir.1999)(noting that alcohol and drug abuse is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir.1994)(noting that many lawyers justifiably fear introducing evidence of alcohol and drug use); *Rogers v. Zant*, 13 F.3d 384,388 (11th Cir.1994)(noting reasonableness of lawyer's fear that defendant's voluntary drug and alcohol use could be "perceived by the jury as aggravating instead of mitigating"); *Wade v. Calderon*, 29 F.3d 1312,1318-19 (9th Cir.1994)(holding counsel was not ineffective for failing to present evidence of petitioner's PCP use because of his belief that jury would use such evidence only in aggravation). Jurors do not view alcohol or drug use as mitigating. Some jurors view illegal drug use as aggravating rather than mitigating. Counsel is not ineffective for recognizing the reality and making a strategic decision based upon it.

Both Freeman's low intelligence and abuse by stepfather were presented by trial counsel and found by the trial court as non-statutory mitigators. Both of these are significantly more compelling mitigation than drug and alcohol abuse. Both I.Q. and childhood abuse involve situations beyond the defendant's control, unlike illegal drug use, which makes such mitigation more compelling to a jury. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1564 (1998)(conducting a survey of actual jurors who sat on death penalty cases and concluding that mental retardation was powerful mitigation based on a survey reporting that 44.3% of jurors stated that it would make them much less likely to vote for death if the defendant was retarded). There is no prejudice.

Counsel seeks a second evidentiary hearing to present drug and alcohol abuse evidence. This is really an ineffective assistance of collateral counsel claim. There is no constitutional right to effective assistance of collateral counsel. *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002)(rejecting a claim that postconviction counsel was ineffective because a defendant has no constitutional right to effective collateral counsel, *citing Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Lambrix v. State*, 698 So.2d 247 (Fla.1996).

Counsel also asserts that Freeman's death sentence is disproportionate. Motion for rehearing at 11. The proportionality of the sentence is a direct appeal issue. *Rose v. State*, 617 So.2d 291 (Fla. 1993)(finding claim of proportionality to be procedurally barred in postconviction proceedings, even though additional mitigating evidence was presented at the evidentiary hearing, because claim had been rejected on direct appeal). It is not properly raised in a post-conviction appeal and certainly not for the first time in a motion for rehearing. This claim is procedurally barred.

Counsel next asserts that the trial court did not consider all mitigating evidence. Motion for rehearing at 14. Counsel argues that the defendant's age should have been found as mitigating as well as several other characteristics. This is a direct appeal issue. *Atwater v. State*, 788 So.2d 223, n.5 (Fla. 2001)(finding a claim that the trial court violated the Eighth Amendment by failing to find and weigh the mitigating circumstances in the record to be procedurally barred because it should have been raised in the direct appeal). It is not properly raised in a post-conviction appeal and certainly not for the first time in a motion for rehearing. This claim is procedurally barred.

Freeman contends his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Motion for rehearing at 19. First, it is not proper to raise an entirely new issue in a motion for rehearing.

Furthermore, *Ring* is not retroactive. The Eleventh Circuit and four state supreme courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and two Florida district courts have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive. *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot.

RETROACTIVITY

Neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not substantive law. They both concern who decides a fact, *i.e.*, the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance). New procedural rules are not applied retroactively.[1]

According to the federal test of retroactivity, *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), only "watershed" rules of criminal procedure which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the

fairness of a proceeding are applied retroactively. *Sawyer v. Smith*, 497 U.S. 227, 242, 111 L.Ed.2d 193, 110 S. Ct. 2822 (1990).[2]

Ring does not enhance the accuracy of the conviction or involve a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that seriously enhance accuracy are applied retroactively. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993)(explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. *Ring*, 536 U.S. at 607 (observing that the Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders). Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

FEDERAL DECISIONS

The Eleventh Circuit has held that *Ring* is not retroactive. In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit, using a *Teague* framework, determined that *Ring* was a new procedural rule, not a new substantive rule because "*Ring* altered only who decides ..." The *Turner* Court reasoned that *Ring* did not alter the facts necessary to establish the aggravating circumstances or the standard of proof. The Court reasoned that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule. They concluded that the retroactivity analysis of *Apprendi* applies equally to *Ring*. The Eleventh Circuit also concluded that *Ring* does not warrant retroactive application under *Teague* because it does not enhance accuracy of fairness. The Court noted that pre-*Ring* sentencing procedure did not diminish the likelihood of a fair sentencing hearing. Rather, *Ring's* new rule, at most, would shift the fact-finding duties during Turner's penalty phase from an impartial judge to an impartial jury. The Eleventh Court explained that *Ring* was based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding context. The Eleventh Circuit relied on two state supreme court decisions holding that *Ring* was not retroactive and their prior decision holding that *Apprendi* was not retroactive. *Colwell v. State*, 59 P.3d 462 (Nev. 2002); *State v. Towery*, 64 P.2d 828 (Ariz. 2003); *McCoy v. United States*, 266 F. 3d 1245,

1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002). The *Turner* Court also relied on United State Supreme Court's precedent finding that *Apprendi* was not plain error. *United States v. Cotton*, 535 U.S. 625, 632-33, 122 S.Ct. 1781, 1786, 152 L.Ed.2d 860 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings and thus did not rise to the level of plain error).[3]

The Ninth Circuit, however, in *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *petition for cert. filed*, (U.S. September, 23, 2003)(No. 03-526), held that *Ring* was retroactive. The Ninth Circuit reasoned that *Ring* is substantive and changes in substantive law are automatically retroactive under *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(noting that *Teague* applies only to procedural rules, not when courts decide the meaning of a criminal statute and explaining that decisions involving a substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333, 94 S. Ct. 2298, 41 L.Ed. 2d 109 (1974).[4]

Alternatively, the Ninth Court held that even if *Ring* is procedural, it is still retroactive under *Teague*. The Ninth Circuit reasoned that the second exception to *Teague* applied because jury factfinding seriously enhances the accuracy

of capital sentencing proceedings and the right to a jury trial is a bedrock procedural element. First, the Ninth Circuit found that juries seriously enhance the accuracy of capital sentencing proceedings compared to judges.[5] The Ninth Circuit also found because the issue involved the Sixth Amendment right to a jury trial, the matter involved a bedrock procedural element essential to fairness.[6] The Ninth Circuit also held that *Ring* errors are not subject to harmless error analysis.[7]

STATE DECISIONS

Four state supreme courts have held that *Ring* is not retroactive. In *Head v. Hill*, 2003 Ga. LEXIS 850 (October 6, 2003), the Georgia Supreme Court, using federal retroactivity principles, held that *Ring* was not retroactive. They rejected a claim that *Ring* required any finding of mental retardation be made by the jury rather than a judge.

In *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003), the Nebraska Supreme Court, using the *Teague* test, held that *Ring* was not retroactive. In 1996, a three-judge panel sentenced Lotter to death. Lotter contended *Ring* is substantive, not procedural, and therefore, *Teague* did not apply. The *Lotter* Court concluded that *Ring* was procedural. The Nebraska Supreme Court explained that a substantive rule is one which determines the meaning of a criminal statute or addresses the criminal significance of certain facts; whereas, a procedural rule is one which determines fact-finding procedures. They

explained that there are two exceptions to the general rule of nonretroactivity announced in *Teague*. *Ring* did not fall within the first *Teague* exception because *Ring* "clearly does not place any type of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." Nor did *Ring* fall within the second *Teague* exception because *Ring* could not be viewed as enhancing the accuracy of the sentence. The *Lotter* Court discussed the Arizona Supreme Court's decision in *State v. Towery*, 64 P.3d 828 (Ariz. 2003), and the Nevada Supreme Court's decision in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), both of which had held that *Ring* was not retroactive. The *Lotter* court found the numerous decisions from state and federal courts finding *Apprendi* not to be retroactive highly persuasive because *Ring* was based on *Apprendi*. The *Lotter* court also found guidance in the United States Supreme Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an *Apprendi* error is not plain error. The Nebraska Supreme Court concluded that *Ring* announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague* exceptions and thus, does not apply retroactively.[8]

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition, Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a jury trial established in *Ring*. The *Colwell* Court explained that in *Ring*, the United States Supreme

Court held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review. *Colwell*, 59 P.3d at 469-472. The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity. The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court, in *Ring*, did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident." The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.2d 828 (Ariz. 2003), the Arizona Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural, not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address

the criminal significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure a fair trial. *Ring* altered who decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct.2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive."[9]

One state supreme court had held that *Ring* is retroactive. In *State v. Whitfield*, 107 S.W.3d 253 (Mo.2003), the Missouri Supreme Court reopened a direct appeal by recalling the mandate. The *Whitfield* Court held that all four steps in the penalty phase included any factual findings related to mitigation and any balancing

of aggravation versus mitigation, not just the finding of one aggravator, must be made by the jury. The *Whitfield* Court declined to adopt the federal test of retroactivity announced in *Teague v. Lane*, 489 U.S. 288, 308, 109. S.Ct. 1060, 103 L.Ed.2d 334 (1989). The *Whitfield* Court held that *Ring* was retroactive under the old *Linkletter/Stovall* test.[10] The *Whitfield* Court determined that the remedy was imposition of a life sentence, not a remand for a new jury to determine the penalty.

The United States Supreme Court has disapproved the practice of using motions to recall the mandate to reopen cases the final minus "extraordinary circumstances" involving "grave, unforeseen contingencies" *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(finding a "grave" abuse of discretion in a federal appellate court granting a motion to recall the mandate in a habeas case because of the "profound interests in repose attaching to the mandate" and the State's interest in finality which is "all but paramount"). A change in law is not an "extraordinary circumstance" involving "grave, unforeseen contingencies." Indeed, the *Calderon* Court suggested that only a strong showing of actual innocence would outweigh the State's interests in finality and thus, justify the recalling of a mandate. No appellate court, state or federal, should recall a mandate six years after it was issued merely because of a subsequent development in the law.

However, having done so, the Missouri Supreme Court does not recognize the consequence of its actions. Because the Missouri Supreme Court recalled the mandate of the direct appeal, the result was to render the case still pending on direct appeal. The recalling of the mandate made the case unfinal. *Whitfield* is now a direct appeal case. Retroactivity in collateral review is not an issue in a case pending on direct review. Any new rule applies to a case on direct review regardless of whether the rule existed at the time of the trial. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)(holding that a new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The *Whitfield* Court's entire discussion of *Teague* and the retroactivity of *Ring* is rendered dicta by the recalling of the direct appeal mandate.

The Missouri Supreme Court had previously held that *Apprendi*, upon which *Ring* was based, was not retroactive. *Whitfield*, 107 S.W.3d at 267 at n.13. So, according to the Missouri Supreme Court, *Apprendi* is not retroactive, but *Ring* is. The Missouri Supreme Court provides no explanation for these incongruous holdings. *Apprendi* involved both the right to a jury trial and the due process standard of proof. *Ring* involves only the right to a jury trial because most, if not all states, including Missouri, determined the existence of aggravators at the higher, beyond a reasonable doubt, standard of proof prior to *Ring*. So, *Ring* is

only half of *Apprendi*.[5] If *Apprendi* is not retroactive, then half of *Apprendi* cannot be.[11]

Furthermore, the Missouri Supreme Court seems to be determined to be deciding retroactivity on a case-by-case basis but retroactivity should be determined based on the stage of litigation. *Teague*, 489 U.S. at 303-305 (deploring the "unequal treatment of those who were similarly situated" under the retroactivity rules applied by the Court prior to *Teague* and noting that the "selective application of new rules violate the principle of treating similarly situated defendants the same."). Additionally, the holding that all steps must be made by the jury is tantamount to a holding that a jury, not the judge, must be the ultimate sentencer in a capital case which is a conclusion specifically rejected by Justice Scalia in his *Ring* concurrence. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with the jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so..."). Furthermore, the *Whitfield* Court's remedy of an automatic life sentence is based on a misreading of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed. 2d 588 (2003). *Whitfield*, 107 S.W.3d at n.20. The *Sattazahn* Court concluded that there was no double jeopardy bar to a new penalty phase after the first jury hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence because there were no factual findings in favor of acquittal by either the jury or judge. The Court explained that it is not the mere

imposition of a life sentence that raises the double-jeopardy bar. Rather, an "acquittal" of the death penalty is required and that means that the jury found that no aggravating circumstances existed. As the *Sattazahn* Court characterized it, the jury deadlocking at 9 to 3 was a "non-result". And the judge's determination was not an acquittal either, because the judge had no discretion pursuant to the statute but to impose a life sentence. The judge made no findings and resolved no factual matters. As the *Sattazahn* Court characterized it, the judge's decision was a "default judgment" required by statute. In *Whitfield*, the penalty phase jury also hung but, unlike *Sattazahn*, the judge imposed death, not life. The *Whitfield* Court improperly reasoned that as a matter of law that the judge was required to enter a life sentence when the death sentence is unconstitutional. However, this was the exact reasoning the *Sattazahn* Court rejected when it rejected any "statutory entitlement to life" argument. An acquittal, for double jeopardy purposes, is determined as a matter of fact by a fact finder, not as a matter of law. Contrary to the reasoning of the *Whitfield* Court, there is nothing "hollow" about a defendant having his penalty determined by a jury in a new penalty phase. The correct remedy for a violation of the Sixth Amendment right to a jury trial is to provide the defendant with a jury. A determination by appellate court is fiat not the correct remedy.

While only a few courts have addressed the retroactivity of *Ring*, numerous courts have addressed the related issue of whether *Apprendi*

is retroactive. Two Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 based on a *Witt* analysis), *rev. granted*, 837 So.2d 410 (Fla. 2003).[12] All eleven federal circuits that have addressed the issue have held that *Apprendi* is not retroactive.[13]

Recently, the Second Circuit joined "this chorus". *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003). The *Coleman* Court reasoned that, while *Apprendi* was a "new" rule of law, it was a procedural rule, not a substantive rule. New substantive rules change the definition of a crime and therefore create a risk that the defendant was convicted of an act that is no longer criminal. To mitigate such a risk, new rules of substantive law are applied retroactively. The Second Circuit noted that *Apprendi* itself said that the substantive basis of New Jersey's enhancement was not at issue; rather, it was the adequacy of its procedures. *Coleman*, citing *Apprendi*, 530 U.S. at 475 and *McCoy*, 266 F.3d at 1257 n.16. The *Coleman* Court rejected the argument that *Apprendi* was substantive because it turned a sentencing factor into an element. The fact of drug quantity was a fact in dispute that had to be proven before *Apprendi*. *Apprendi* merely changed who decided the fact and at what standard of

proof. Drug quantity was always an element in the sense that it was something that the government had to prove to someone at some standard. The fact was not "new" in this sense and therefore, was not truly a new element.

The First Circuit has also recently held that *Apprendi* is not retroactive. *Sepulveda v. United States*, 333 F.3d 55 (1st Cir. 2003). The *Sepulveda* Court held that *Apprendi* is not retroactive because it does not seriously enhance the accuracy of convictions. While an *Apprendi* error may raise questions as to the length of his sentence, inaccuracies of this nature, occurring after a defendant has been duly convicted by a jury beyond a reasonable doubt are matters of degree and do not trump the general rule of nonretroactivity. The First Circuit explained that the length of the sentence was "not plucked out of thin air, but, rather, was determined by a federal judge based upon discrete findings of fact established by a fair preponderance of the evidence." The First Circuit agreed with the Seventh Circuit's observation that findings by federal judges, though now rendered insufficient in certain instances by *Apprendi*, are adequate to make reliable decisions about punishment because "[a]fter all, even in the post-*Apprendi* era, findings of fact made by the sentencing judge, under a preponderance standard, remain an important part of the sentencing regimen." The First Circuit noted that watershed rules of criminal conduct procedure are "hen's-teeth" rare. They noted the Supreme Court is reluctant to establish rules that enjoy the venerated status of

watershed. A decision by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that undermines the fairness of judicial proceedings. The First Circuit Court also noted that applying *Apprendi* retroactively would create an unacceptably high risk that those found guilty of criminal conduct might escape suitable punishment. They observed that although the *Apprendi* rule is important as a means of clarifying the proper factfinding roles of judge and jury, it affords an innocent defendant no additional shield from wrongful conviction. They rejected any reliance upon Justice O'Connor's characterization, in her dissent, of *Apprendi* as "a watershed change in constitutional law" because her concern was a practical one regarding the "flood of petitions by convicted felons seeking to invalidate their sentences" that the decision would cause. Several state supreme courts have held that *Apprendi* is not retroactive either.[14]

While the *Ring* Court did not address the retroactivity of their new decision, Justice O'Connor, in her dissent, stated that *Ring* was not retroactive. *Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450(2002)(O'Connor, J., Dissenting)(noting that capital defendant's will be barred from taking advantage of the holding on federal collateral review, citing 28 U.S.C. §§ 2244 (b)(2)(A), 2254 (d)(1) and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The United States Supreme Court has refused to apply right to jury trial cases retroactively in prior cases. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S.Ct. 2093,

2095, 20 L.Ed.2d 1308 and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive). Thus, the United States Supreme Court will not apply *Ring* retroactively either.

This Court has never addressed the issue of the retroactivity of *Ring*. This Court should address the question, adopt *Teague* and hold that *Ring* is not retroactive.

CONCLUSION

The State respectfully requests that this Honorable Court deny the motion for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEARBY CERTIFY that a true and correct copy of the foregoing RESPONSE TC MOTION FOR REHEARING has been furnished by U.S. Mail to Frank Tassone, Esq., 1833 Atlantic Boulevard Jacksonville, FL 32207 this 10th day of November, 2003.

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[1] Florida uses the old constitutional test for retroactivity rather than the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Witt v. State*, 387 So.2d 922 (Fla. 1980). Florida courts should also adopt the *Teague* test for retroactivity. The *Witt* test of retroactivity was based on two United States Supreme Court cases dealing with retroactivity, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The United States Supreme Court no longer uses these tests for determining retroactivity on collateral review because, as the *Teague* Court observed, the old *Linkletter/Stovall* test led to inconsistent results and disparate treatment of similarly situated defendants. *Teague*, 489 U.S. at 302-303. Both the Arizona and New Hampshire Supreme Court have adopted *Teague* for the pragmatic reason that the law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity tests. *State v. Tallard*, 816 A.2d 977, 980 (N.H. 2003); *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991). Moreover, *Witt* raises serious due process concerns. One of the prongs of *Witt* is that the new rule is constitutional in nature, implying that changes in the interpretation of a statute are automatically not retroactive, but it is changes in the meaning of the statute that raise actual innocence problems. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828, (1998)(noting that *Teague* applies to procedural rules, not when courts decide the meaning of criminal statute and explaining that decisions involving substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). Any state with a retroactivity test which lacks a substantive / procedural distinction runs the risk of violating due process, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the

evidence analysis when the element of the crime changed); *see also Bunkley v. Florida*, 2003 WL 21210417 (May 27, 2003)(remanding for reconsideration of a retroactivity issue where this Court employed the *Witt* test). Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems. Florida should adopt *Teague* to avoid these concerns.

[2] Under *Teague*, there are two exceptions to the general rule of non-retroactivity. The first exception, relating to substantive rules, requires retroactive application if the new rule places private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendant's because of their status or offense. *Saffle v. Parks*, 494 U.S. 484, 494, 108 L.Ed.2d 415, 110 S.Ct. 1257 (1990). The second exception is for watershed rules of criminal procedure which implicate the fundamental fairness and accuracy of the criminal proceeding. *Ring* and *Apprendi*, because they are both new procedural rules, not substantive, involve only second exception, not the first.

[3] The Fifth Circuit has noted that it doubts *Ring* is retroactive. *In re Johnson*, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(declining to reach the issue but questioning whether *Ring* can be retroactive because *Apprendi* is not retroactive in the circuit and noting that "logical consistency" suggests that *Ring* is not retroactive since *Ring* is essentially an application of *Apprendi*).

[4] While the Ninth Circuit quotes *Bousley*, the quotes are taken out of context. Changes in substantive law are applied retroactively because they raise the possibility of legal innocence. When the definition of an element of a crime is changed, it raises the possibility that a defendant has been convicted of conduct that is not criminal under the correct definition. *Ring* does not involve any possibility of legal innocence or legally innocent of the death penalty. Therefore, *Ring* is not substantive and *Bousley* does not apply.

[5] The majority gave five reasons for its belief that juries seriously enhance the accuracy of capital sentencing proceedings compared to judges: (1) presentation of inadmissible evidence to judges; (2) truncated and informal presentation of evidence and argument; (3) judge's decision did not reflect the "the conscience of the community"; (4) judges' view of the capital sentencing as being "routine"; and (5) the political pressure on judges facing election. The first and second observations are non sequiturs. They concern alleged flaws in penalty phase proceedings, not the accuracy of judge versus jury sentencing. Garbage in, garbage out is true regardless of who hears the garbage. Furthermore, juries are also exposed to victim impact statements and inadmissible hearsay during penalty phase. § 921.141 (7), Fla. Stat. (2002)(providing that the prosecution may introduce, and subsequently argue, victim impact evidence, once it has provided evidence of one aggravating circumstance); *Windom v. State*, 656 So.2d 432, 438 (Fla.1995)(reject an argument that victim impact evidence amounts to nonstatutory aggravation); §921.141(1), Fla. Stat. (2002)(providing any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements); *Rodriguez v. State*, 753 So.2d 29, 47 (Fla. 2000)(noting that under § 921.141, the appropriate test for determining whether hearsay evidence is admissible is whether the evidence is relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."). Unlike juries, judges are trained to think about the accuracy of hearsay. The third and fifth observations are contradictory. Either judges live in ivory towers far from the crowd or they respond to the community's desires due to democratic forces; they cannot be both. Either judges are out of touch with the community OR they are in touch with the community due to the political pressures of elections. The fourth observation is

just plain silly. The Ninth Circuit uses descriptions such as "acclimation" to the capital sentencing process, "routine" "habituation" brought about by imposing capital punishment under "near rote conditions" and "just another criminal sentence" to describe judges' view of capital sentencing. Translated, this means that judges are experienced in capital sentencing and juries are not. Experience increases accuracy. Judges have extensive prior experience with factfinding and are legally trained. The *Ring* Court, itself, explained that while judge fact-finding may be more efficient, the Sixth Amendment requires juries. Regardless of the superiority of judicial factfinding, the Sixth Amendment requires juries. The *Ring* Court also noted that the superiority of judicial factfinding in capital cases was far from evident. *Ring*, 536 U.S. at 607. However, the *Ring* Court did not take the position that jury factfinding was superior to judicial factfinding as the Ninth Circuit did. Judges are actually more accurate than juries due to their experience and legal training. Because judges are at least as accurate as juries in their fact-finding, *Ring* does not seriously enhance accuracy in capital sentencing and therefore, does not meet this prong of *Teague*.

[6] United States Supreme Court precedent does not support the view that cases involving the Sixth Amendment right to a jury trial are automatically bedrock. The United States Supreme Court has declined to apply cases retroactively that involve the right to a jury trial. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S. Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application.").

[7] United States Supreme Court precedent does not support the view that *Ring* errors are not subject to harmless error analysis. While the United States Supreme Court has not directly addressed whether *Ring* errors are subject to harmless error analysis, it has held that *Apprendi* errors are subject to harmless error analysis. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an *Apprendi* claim is not plain error where the indictment failed to include the quantity of drugs because the *Apprendi* error did not

seriously affect fairness, integrity, or public reputation of judicial proceedings). Moreover, the United States Supreme Court has held that the omission of an element of a crime can be harmless in *Neder v. United States*, 527 U.S. 1, 144 L.Ed.2d 35, 119 S.Ct. 1827 (1999). While the Ninth Circuit attempts to distinguish *Neder*, the United States Supreme Court itself cited *Neder* in *Ring* when it declined to address harmlessness. *Ring* at n.7. The only difference is that *Neder* was a non-capital case. *Summerlin* at n.20.

[8] The Nebraska Supreme Court had previously granted relief based on *Ring* in a direct appeal. *State v. Gales*, 658 N.W.2d 604 (Neb. 2003)(remanding for a new penalty phase). Nebraska was judge only sentencing, unlike Florida which is a hybrid state. *Ring*, 536 U.S. 584 at n.6; Neb. Rev. Stat. §29-2520 (1995).

[9] The Arizona Supreme Court analyzed the retroactivity of *Ring* using a *Teague* test but also analyzed the issue using the test of *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Under the *Allen* framework, the court weighed three factors: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Arizona Supreme Court concluded that *Ring* was not retroactive under *Allen* either. The *Allen* is similar to Florida's *Witt* test. So, *Ring* is not retroactive under *Witt* either.

[10] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

[11] In Florida, aggravating factors are found beyond a reasonable doubt. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992)(stating it is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt). Florida has always required the higher standard of proof in this area. *State v. Dixon*, 283 So.2d 1,9 (Fla. 1973). Aggravators were already decided at

the higher standard of proof before *Apprendi* or *Ring*. The standard of proof wing is probably the more critical part of *Apprendi* in terms of accuracy and that wing is not at issue in a capital case. The "who" wing of *Apprendi* is the only part at issue in a *Ring* claim. So, *Ring* actually is only half of *Apprendi*.

[12] Briefing is complete and the oral argument has been held in *Hughes*. *Hughes*, SC02-2247. This Court issued an order to stay the proceedings pending resolution of *Hughes* in *Figarola*, SC03-586.

[13] *Sepulveda v. United States*, 2003 WL 212366 (1st Cir. May 29, 2003)(discussed infra); *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003)(discussed infra); *United States v. Swinton*, 2003 U.S. App. LEXIS 12697 (3d Cir. June 23, 2003)(relying on the Supreme Court's own description of *Apprendi* as procedural and holding *Apprendi* is not retroactive); *United States v. Jenkins*, 2003 U.S. App. LEXIS 12265 (3d Cir. June 18, 2003)(holding *Apprendi* is procedural and not retroactive); *United States v. Sanders*, 247 F.3d 139 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032, 122 S.Ct. 573, 151 L.Ed.2d 445 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct. 1919, 155 L.Ed.2d 840 (2003)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F.3d 841 (6th Cir.2002) *cert. denied*, - U.S. -, 123 S.Ct. 711, 154 L.Ed.2d 647 (2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15, (1999); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct 541, 154 L.Ed.2d 334 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d. 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097, 122

S.Ct. 848, 151 L.Ed.2d 725 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664. 667 (9th Cir.2002), *cert. denied*, 154 L.Ed.2d 243, 123 S.Ct. 48 (2002)(holding *Apprendi* does not meet either prong or *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.2002), *cert. denied*, - U.S. -, 123 S.Ct. 388, 154 L. Ed. 2d 315 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review).

[14] *People v. De La Paz*, 791 N.E.2d 489 (Ill. 2003)(holding *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is a procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review relying on *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001).

APPENDIX 3

SUPREME COURT OF FLORIDA

CASE NO.: SC01-2007
Lower Tribunal No.: 86-11599-CFA

JOHN D. FREEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

MOTION TO FILE REPLY TO OR IN THE ALTERNATIVE REQUEST AN ORAL ARGUMENT TO STATE OF FLORIDA'S RESPONSE TO DEFENDANT'S MOTION FOR REHEARING

Defendant, JOHN D. FREEMAN, by and through his undersigned counsel, files this Motion to File Reply To or in the alternative request an Oral Argument to State of Florida's Response to Defendant's Motion for Rehearing, and in support thereof states as follows:

1. Defendant was previously convicted of first-degree murder. (R. 145, 1564).

2. Defendant was subsequently sentenced to death after a jury vote of 9-3. (R. 257-259).

3. Defendant appealed his convictions and sentences, which were later affirmed on

direct appeal. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990).

4. Defendant filed a 3.850 Motion for Post-conviction Relief in 1995, in the Fourth Judicial Circuit, and said Motion was denied.

5. Defendant appealed the denial of said Motion to the Florida Supreme Court, and this Court remanded the issue of ineffectiveness of counsel at the penalty phase and the issue of racial bias claim for an evidentiary hearing, and affirmed the rest of said denial. *Freeman v. State*, 761 So. 1055 (Fla. 2000).

6. The trial court denied the remanded issues of the 3.850 Motion after an evidentiary hearing on July 16th and 17th, 2001.

7. Defendant appealed the trial court's denial to the Florida Supreme Court, alleging the following issues: (1) Ineffective assistance of counsel at the guilt phase of trial for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty (2) Ineffective assistance at the penalty phase for failing to present evidence in mitigation.

8. On July 11, 2003, the Supreme Court of Florida affirmed the trial court's denial of Defendant's Motion for Post-conviction Relief under Fla. R. Crim. Pro. 3.850. *Freeman v. State*, 852 So. 2d 216 (Fla. 2003).

9. The undersigned counsel was appointed to represent Defendant in the remainder of Post-conviction proceedings on July 9th, 2003.

10. The undersigned counsel filed a Motion for Rehearing in this Court on October 31, 2003.

11. The State filed a timely response to said Motion for Rehearing, which was received by the undersigned on November 12, 2003.

12. The State's response alleges, among other issues that *Ring v. Arizona* does not apply retroactively to collateral review. (State's Response, p. 4)

13. The State also makes the assertion that this Court should change its test for determining retroactivity by receding from *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and adopting *Teague v. Lane*, 489 U.S. 288 (1989).

14. The undersigned asserts that either the *Witt v. State* test or the *Teague v. Lane* test, *Ring v. Arizona* applies retroactively in Florida.

15. The undersigned further asserts that the *Teague v. Lane* test should not be adopted by Florida, because *Witt v. State* passes constitutional muster.

16. Lastly, the State makes the assertion that Defendant's trial counsel was not ineffective for making a strategic decision not to use the mitigation of Defendant's use of drugs and alcohol. (State's Response, p. 2).

17. The State supports this claim by citing cases that hold that "alcohol and drug use are dangerous mitigation," and Defendant's established nonstatutory mitigators of low I.Q. and abuse by his stepfather "are significantly more compelling mitigation than drug and alcohol abuse." (Id.)

18. The State concludes by showing that Defendant counsel's failure to present evidence of drug and alcohol abuse did not prejudice the

Defendant, and supports this assertion by citing a Law Review article which essentially states that mental retardation was the most powerful mitigation based on a survey of jurors. (Id.)

19. However, the State fails to recognize and answer the crux of Defendant's argument, i.e., the correlation between Defendant's drug and alcohol abuse and possible mental mitigation in light of said abuse, and whether an expert should have been appointed to establish possible mental mitigation.

20. The State misunderstands Defendant's argument regarding Defendant's trial counsel's ineffectiveness.

21. In other words, Defendant does not argue that his trial counsel was ineffective for not putting on evidence of drug and alcohol abuse, but rather Defendant argues that his trial counsel was ineffective for not raising or having an expert determine if Defendant's long term drug and alcohol abuse lead to any statutory mental mitigation, to-wit: (1) extreme mental and emotional disturbance and, (2) capacity to control one's behavior.

22. The said mental mitigation, unlike the State's assertion (the State makes the assertion that "jurors do not view alcohol or drug use as mitigating")(State's Response, p. 2), are two of the weightiest mitigators available to a Defendant, and failure to present this mitigation may constitute prejudicial ineffectiveness. See *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002), [*holding the mitigators of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control behavior are of*

the weightiest order, and the failure to present them in the penalty phase may constitute prejudicial ineffectiveness].

23. Therefore, Defendant argues, in light of his long-term drug and alcohol abuse, Defendant's trial and appellate counsel were ineffective in failing to present an expert witness who was qualified to give an opinion as to the correlation between the Defendant's mental mitigation and his substance abuse. Said argument was also known to the trial court. ("this Court will also note that the Defendant did not present at the evidentiary hearing from an expert qualified to testify regarding the effects of Defendant's alcohol and drug abuse")(Trial Court's denial of Defendant's 3.850 Motion on evidentiary review).

24. Further, this said failure to have a qualified expert testify to any statutory mental mitigation the Defendant might have as the result of his said substance abuse prejudiced the Defendant, because this mitigation is of the weightiest order, and the failure to examine the said possible mental mitigation cannot be held to be strategic when there were no other statutory mitigators presented. This failure to examine the correlation between Defendant's substance abuse and mental mitigation is the reason why Defendant seeks an evidentiary hearing, and why Defendant's trial counsel was ineffective.

WHEREFORE, Defendant requests this Honorable Court to grant Defendant's Motion to file a reply to the said State's responses to Defendant's Motion for Rehearing, or in the alternative, Defendant requests an Oral Argument

on the issue(s) discussed in this Motion, to-wit: (1) *Ring v. Arizona* and whether it applies retroactively to Florida, (2) Whether *Witt v. State* should be receded and *Teague v. Lane* be adopted as the test for determining retroactivity in Florida collateral review cases, and (3) Whether Defendant's counsel was ineffective for failing to have a qualified expert determine whether Defendant had any statutory mental mitigation as the result of his long term drug and alcohol abuse.